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Evenflo Company, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

TINA ERVIN, as mother of and on behalf
of A.H.E., a minor,

Plaintiff,

v.

EVENFLO COMPANY, INC.; TOYOTA
MOTOR CORPORATION; TOYOTA
MOTOR SALES, U.S.A.,

Defendants.

Case No. 3:14-cv-00234-SLG

**DEFENDANTS’ JOINT REPLY TO PLAINTIFF’S OPPOSITION TO MOTION FOR
ADDITIONAL TIME TO DEPOSE PLAINTIFF’S EXPERT CARLEY WARD**

Defendant Evenflo Company, Inc. (hereinafter “Evenflo”) and Defendants
Toyota Motor Corporation and Toyota Motor Sales, U.S.A. (hereinafter “Toyota”),
by and through their counsel of record, hereby reply to Plaintiff’s Opposition to
Defendants’ Joint Motion for Additional Time to Depose Plaintiff’s Expert Carley
Ward.

1 **I. The Sole Issue Before the Court is the Length of Dr. Ward's Deposition**

2 Plaintiff agrees that Dr. Ward may be deposed regarding the opinions and
3 information contained in her rebuttal report. The sole issue before the Court is the
4 length of the deposition.

5 **II. Plaintiff Does Not Dispute the Foundational Elements of Defendants'**
6 **Motion**

7 Plaintiff does not dispute that (a) Dr. Ward's "rebuttal report" contains
8 additional information and new opinions which were not disclosed in her initial
9 report, (b) neither Evenflo nor Toyota had an opportunity to examine Dr. Ward
10 regarding these new opinions, or (c) 1 hour and 17 minutes is insufficient for *both*
11 Evenflo and Toyota to fairly examine Dr. Ward as to the new material in her
12 "rebuttal report." Plaintiff doggedly relies on the presumptive time limit in Rule
13 30(d)(1) and argues that Defendants have somehow "created their own dilemma"
14 by "prematurely" deposing Dr. Ward.¹

15 **III. Counsel's Claim Notwithstanding, "Normal Process" is to Follow the**
16 **Civil Rules and Decisional Authority**

17 Contrary to Plaintiff's argument, Defendants were not required to wait to
18 depose Plaintiff's experts until all initial and rebuttal expert reports were
19 exchanged.² Indeed, the purpose of staggered expert report deadlines is to
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21
22 ¹ Likewise, Plaintiff quotes but ignores the salient language that follows the 7 hour
23 limit, which provides for "additional time ... if needed to fairly examine the deponent
24"

25 ² With all due respect, counsel is "playing the old lawyer card" which seasoned trial
26 lawyers such as Mr. Flanigan sometimes use to buttress assertions that do not have
support in the Civil Rules or case law.

1 promote efficiency, eliminate “guess work” and otherwise focus the opinions of
2 Defendants’ experts before they submit their reports.³

3 Dr. Ward has submitted a “rebuttal report” that contains new opinions and
4 information. If Defendants are not given a reasonable amount of time to examine
5 her concerning this new information, the reason for staggered reports and Rule
6 26’s fundamental purpose of avoiding surprise at trial (and encouraging pre-trial
7 resolution) will be thwarted.

8 **IV. The Advisory Committee Anticipated the Very Situation Presented Here**

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10 Further, Plaintiff ignores the fact that Evenflo and Toyota are separate
11 parties defending against distinct claims, impugning the design and performance of
12 wholly different products. *Both* Evenflo and Toyota must have a chance to “fairly
13 examine” Dr. Ward regarding her new opinions in this matter. Indeed, the Advisory
14 Committee Notes to Civil Rule 30 recognize that “[i]n multi-party cases, the need
15 for each party to examine the witness may warrant additional time” This
16 comment is particularly relevant as it applies to the deposition of Plaintiff’s primary
17 liability expert, Dr. Ward. She offers opinions on multiple subjects, on a variety of
18 different disciplines, which are independently critical of both Evenflo and Toyota.
19 While Defendants will studiously avoid duplicative questioning, Evenflo and Toyota
20 cannot both adequately examine Dr. Ward as to her new opinions in only 1 hour
21 and 17 minutes.
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25 ³ Plaintiff did not object to staggered deadlines.

1 **V. Plaintiff Does Not Complain of Material Prejudice**

2 Plaintiff has not made any showing that she will be prejudiced by allowing
3 Defendants additional time to depose Dr. Ward. Indeed, Plaintiff's counsel will
4 certainly attend the deposition regardless of its length, and Defendants have
5 agreed to compensate Dr. Ward at her normal hourly rate. A few additional hours
6 will not prejudice Plaintiff.

7 **VI. Plaintiff's "Floodgates" Argument is Unpersuasive**

8 Finally, Plaintiff's argument about retaking Defendants' 30(b)(6) depositions
9 is a "red herring." 30(b)(6) witnesses testify to *facts* pertaining to specific
10 categories. They do not render opinions and submit reports. Had the Defendants'
11 30 (b)(6) witnesses materially changed or supplemented their factual testimony in
12 correction sheets, Plaintiff would have grounds to examine them in a follow-up
13 deposition, regardless of how much "on record" time was expended in the first
14 deposition. Unlike with Dr. Ward, this did not occur.

15 **VII. Conclusion**

16 Defendants do not seek to "re-depose" Dr. Ward, as Plaintiff states. Instead,
17 Defendants request additional time to depose Dr. Ward on *new* opinions and *new*
18 information contained in her "rebuttal report." As set forth in Defendants' motion,
19 good cause exists to allow Defendants to depose Dr. Ward for an additional 3.5
20 hours regarding her "rebuttal report." Plaintiff has failed to articulate a legitimate
21 reason for refusing to allow this additional time. Accordingly, Defendants' motion
22 should be granted.
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1 DATED at Anchorage, Alaska, this 8th day of June, 2018.

2 CLAPP, PETERSON, TIEMESSEN,
3 THORSNESS & JOHNSON LLC
4 Attorneys for Defendant Evenflo Company,
Inc.

5
6 By /s/ John B. Thorsness
John B. Thorsness, ABA No. 8211154

7 DATED at Anchorage, Alaska, this 8th day of June, 2018.

8 HUGHES WHITE COLBO WILCOX
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10 Attorneys for Defendants
11 Toyota Motor Sales, U.S.A., Inc. and
Toyota Motor Corporation

12
13 By /s/ Steven S. Tervooren (consent)
14 ABA No. 7910085
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2018, a copy of the foregoing document was served electronically through the ECF system on:

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By: /s/ John B. Thorsness